

APPEAL NO. 040485  
FILED APRIL 26, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 3, 2004. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on \_\_\_\_\_; that the claimant's horseplay was not a producing cause of the claimed injury; and that the claimant had disability, as a result of his compensable injury, from May 25 to September 1, 2003. In its appeal, the appellant (carrier) asserts error in each of those determinations. The appeal file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant's horseplay was not a producing cause of his injury. That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). There was conflicting evidence on the issue of whether the claimant was a willing participant in the horseplay. It was a matter for the hearing officer, as the fact finder, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Nothing in our review of the record reveals that the hearing officer's horseplay determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In its appeal, the carrier cites Texas Workers' Compensation Commission Appeal No. 010132, decided February 28, 2001, for the proposition that the Appeals Panel has rejected the argument that the horseplay exception does not apply when the claimant's participation in the horseplay is involuntary. To the extent that Appeal No. 010132 can be read as so stating, it would be an incorrect statement of the law. It is well-settled that the defense of horseplay only applies if an employee willingly participates in an act of horseplay and the horseplay is a producing cause of the injury. That is, if an employee willingly engages in an act of horseplay and that act of horseplay results in an injury, the horseplay is a deviation from the course and scope of employment which defeats a claim for compensation. Cassell v. United States Fidelity & Guaranty Co., 283 S.W. 127 (Tex. 1926); United General Ins. Exchange v. Brown, 628 S.W.2d 505 (Tex. App.-Amarillo 1982, no writ); Texas Workers' Compensation Commission Appeal No. 002191, decided October 26, 2000; Texas Workers' Compensation Commission Appeal No. 980618, decided May 11, 1998; Texas Workers' Compensation Commission Appeal

No. 971594, decided September 26, 1997. In this instance, the hearing officer was not persuaded that the claimant willingly participated in the horseplay and the evidence sufficiently supports that determination. Thus, he did not err in determining that the carrier was not relieved of liability under Section 406.032(2).

The success of the carrier's argument that the claimant did not sustain a compensable injury and that he did not have disability is dependent upon the success of its argument that the hearing officer erred in making the horseplay determination. Given our affirmance of the determination that the claimant was not engaged in horseplay at the time of the \_\_\_\_\_, injury, we likewise affirm the determination that the claimant sustained a compensable injury and had disability from May 25 to September 1, 2003.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PENNSYLVANIA MANUFACTURERS ASSOCIATION** and the name and address of its registered agent for service of process is

**CT CORPORATION  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

---

Elaine M. Chaney  
Appeals Judge

CONCUR:

---

Judy L. S. Barnes  
Appeals Judge

---

Gary L. Kilgore  
Appeals Judge